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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1453

NEAL R. WOOLEY, individually and as
Chief of Police, Lebanon, New Hampshire,
PAUL A. DOYON, individually and as
Director of the New Hampshire State Police, and
FREDERICK N. CLARKE, JR., individually and as
Commissioner of the
New Hampshire Department of Motor Vehicles,

Appellants

v.

GEORGE MAYNARD and MAXINE MAYNARD,

Appellees.

BRIEF FOR APPELLANTS

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NO. 75-1453

NEAL R. WOCLEY, individually and as Chief of Police, Lebanon, New Hampshire, PAUL A. DOYON, individually and as Director of the New Hampshire State Police, and FREDERICK N. CLARKE, JR., individually and as Commissioner of the New Hampshire Department of Motor Vehicles,

Appellants,

v.

GEORGE MAYNARD and MAXINE MAYNARD,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of New Hampshire (App. 67) is reported at 406 F. Supp. 1381.

JURISDICTION

This appeal is from the judgment and permanent injunction of the United States District Court for the District of New Hampshire, a three-judge Court convened by requirement of 28 U.S.C. §2281, in a civil action instituted by the Appellees, pursuant to 42 U.S.C. §1983. The action sought to restrain the enforcement of a State statute upon the ground of the unconstitutionality of the statute. The judgment and permanent injunction were entered on February 9, 1976. (App. 77). Notice of appeal to this Court was filed by the Appellants on February 17, 1976 (App. 78), the jurisdiction of this Court being invoked pursuant to 28 U.S.C. §1253. Probable jurisdiction was noted by this Court on June 21, 1976.

QUESTIONS PRESENTED

I. WHETHER FEDERAL INTERVENTION IN A STATE CRIMINAL PROCEEDING IS PRECLUDED WHERE THE DEFENDANT THEREIN HAS HAD A FULL OPPORTUNITY TO UTILIZE STATE APPELLATE REMEDIES AND HAS FAILED TO DO SO.

II. WHETHER, CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE STATE OF NEW HAMPSHIRE MAY PROHIBIT BY CRIMINAL SANCTION THE KNOWING OBSCURATION OF THE WORDS "LIVE FREE OR DIE" ON NEW HAMPSHIRE MOTOR VEHICLE LICENSE PLATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution.

The principal federal statute involved is 42 U.S.C. §1983:

> "*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The principal New Hampshire statutes involved are the following:

N.H. RSA 3:8

> "*State Motto.* The words 'Live Free or Die', written by General John Stark, July 31, 1809, shall be the official motto of the state."

N.H. RSA 263:1 (supp)

> "*Number Plates.* Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto 'live free or die' written thereon. The plates shall be kept clean."

N.H. RSA 262:27-c (supp)

> "*Misuse of Plates.* Any person who knowingly attaches or permits to be attached to a motor vehicle a number plate assigned by the director, or authority of any other jurisdiction, to another vehicle or who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle or who knowingly and deliberately fails to display on a motor vehicle proper lights, as herein provided, or the number plates and the registration number duly issued therefor shall be guilty of a misdemeanor."

STATEMENT OF THE CASE

The parties have stipulated as to the facts of the case. (App. 14). A brief summary follows.

The Appellees are husband and wife and are residents of Claremont, New Hampshire. They own two non-commercial motor vehicles, a 1971 Toyota and a 1968 Plymouth, both of which are registered in the State of New Hampshire. Pursuant to N.H. RSA 263:1 (supp), two pairs of non-commercial motor vehicle license plates which bear the State Motto "Live Free or Die" were issued to the Appellees for the purpose of the registration of their vehicles.

In March or April of 1974, the Appellees commenced placing non-transparent tape over the State Motto. In May or June of the same year, Mr. Maynard literally cut out the words "or Die" on all four license plates, thereafter covering the resulting holes, as well as the words "Live Free", with non-transparent tape. (Exhibit No. 1).

On November 27, 1974, Mr. Maynard was charged by a Lebanon, New Hampshire, District Court complaint with having committed the offense of misuse of plates, contrary to N.H. RSA 262:27-c (supp), in that he knowingly attached to one of his motor vehicles license plates having been duly issued by the State Director of Motor Vehicles, but on which he knowingly had obscured or permitted to be obscured the words "Live Free or Die." (App. 17 and 18). Mr. Maynard was found guilty by the Lebanon District Court on December 6, 1974, and was ordered to pay a fine of $25.00, which fine was suspended. Mr. Maynard did not appeal this conviction.

By a Lebanon District Court complaint dated December 28, 1974, Mr. Maynard was charged with a second violation of N.H. RSA 262:27-c (supp). (App. 19 and 20). He was found guilty on January 31, 1975, was sentenced to pay a fine of $50.00 and was sentenced to the Grafton County, New Hampshire, House of Correction for six months, which imprisonment was suspended. Mr. Maynard again did not appeal the conviction. He advised the Lebanon District Court that he would refuse to pay the fines, now totaling $75.00, as a matter of conscience and not due to any inability to pay. The Lebanon District Court then ordered Mr. Maynard be committed to the House of Correction for fifteen days. He served his sentence and was released on February 15, 1975.

Prior to trial on the second complaint, Mr. Maynard was charged on January 3, 1975, with a third violation of N.H. RSA 262:27-c (supp). (App. 21 and 22). He was found guilty by the Lebanon District Court on the same date as his second conviction. The third complaint was "continued for sentence." (App. 21 and 22). Again, Mr. Maynard failed to appeal his conviction.

In his defense at the time of trial on each complaint, Mr. Maynard argued that his physical acts with respect to the license plates were the result of personal religious convictions.

On March 4, 1975, the Appellees filed with the United States District Court for the District of New Hampshire a civil complaint for declaratory and injunctive relief, naming as defendants the Appellants herein. The District Court, after notice and hearing, ruled that N.H. RSA 262:27-c (supp), as applied to the Appellees herein, is violative of the First and Fourteenth Amendments and permanently enjoined the Appellants herein "from arresting and prosecuting plaintiffs at any time in the future for covering over that portion of their license plates that contains the motto "Live Free or Die." (App. 76).

SUMMARY OF ARGUMENT

The circumstances of this case, involving State misdemeanor prosecutions for misuse of motor vehicle license plates, preclude federal intervention. Criminal actions were brought only against Appellee Mr. Maynard. His constitutional claims were raised in the State court proceedings and were disposed of by the judgments rendered against him. Thereafter having elected neither to request the transfer of the constitutional issues to the New Hampshire Supreme Court nor to exercise his absolute right to appeal the judgments to the New Hampshire Superior Court for a trial *de novo* by jury, intervention by a United States District Court and the granting of permanent injunctive relief frustrates all principles of equity, comity and federalism. The evidence is that of good faith attempts to enforce a State statute, of the ability of the State courts to protect federal constitutional rights, and of no irreparable injury to Appellee Mr. Maynard in the absence of federal intervention. With respect to Appellee Mrs. Maynard, there is no evidence of deprivation by the

Appellants of any of her federal constitutional rights. In addition, her interests are so closely related to those of her husband that the principles of *Younger* vs. *Harris,* 401 U.S. 37 (1971), preclude federal relief in an action commenced under 42 U.S.C. §1983.

Prohibition by criminal sanction by the State of New Hampshire of obscuration of the letters and numbers on duly issued motor vehicle license plates is clearly within the police power of the State and furthers substantial State interests, not the least of which is the establishment of a uniform motor vehicle registration system. Accordingly, the obscuration by the Appellees of the State Motto "Live Free or Die" on their license plates is punishable in the absence of any infringement of their First Amendment rights. To require a person who registers a motor vehicle in New Hampshire and who utilizes this State's highways to attach to his motor vehicle license plates bearing the State Motto constitutes no required affirmation of belief on the part of that person. *State* vs. *Hoskin,* 112 N.H. 332 (1972). The acts of the Appellees in physically removing and obscuring the State Motto on their license plates do not constitute symbolic speech. A careful analysis of the circumstances of this case satisfies the standards for justified governmental regulation set forth in *United States* vs. *O'Brien,* 391 U.S. 367 (1968). Neither by their conduct nor by a combination of their conduct and surrounding circumstances did the Appellees convey any particularized message likely to be understood. Their acts, without explanation, are interpretable only as whimsy or bizarre behavior. Any communication peculiar to their acts falls far short of warranting First Amendment protection.

ARGUMENT

I.

FEDERAL INTERVENTION IN A STATE CRIMINAL PROCEEDING IS PRECLUDED WHERE THE DEFENDANT THEREIN HAS HAD A FULL OPPORTUNITY TO UTILIZE STATE APPELLATE REMEDIES AND HAS FAILED TO DO SO.

On three separate occasions Appellee Mr. Maynard was summoned to appear before the Lebanon, New Hampshire, District Court for violations of N.H. RSA 262:27-c (supp), which provides in pertinent part:

> "*Misuse of Plates.* Any person . . . who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle . . . shall be guilty of a misdemeanor."

Conviction of a misdemeanor is punishable by a sentence of imprisonment not to exceed one year and a fine not to exceed one thousand dollars. (N.H. RSA 651:2, II (c) and IV (a)). Under New Hampshire's two-tier judicial system, district courts have original, but not exclusive, jurisdiction over misdemeanor cases. (See: New Hampshire Constitution, Part II, Art. 77; N.H. RSA 502-A:11; *State* vs. *Handfield,* 115 N.H. ____, 348 A.2d 352 (1975), *cert. denied,* ____ U.S. ____, June 30, 1976.) Upon conviction a defendant is afforded an absolute right of appeal and trial *de novo* by jury, unless waived, to the superior court. (*State* vs. *Handfield, supra,* at 353). Constitutional issues not only may be raised by a defendant before either the district or superior courts, but also upon request of a defendant may be reserved and transferred without ruling to the New Hampshire Supreme Court. (N.H. RSA 502-A:17-a (supp)).

At the time of Appellee Mr. Maynard's first appearance before the district court, he raised a First Amendment defense. (App. 30-32; Exhibit No. 3). He likewise raised a similar defense when appearing before the district court to answer to the second and third criminal complaints. (App. 30-32; 21 and 22). However, during the course of each trial Mr. Maynard elected neither to request the reservation and transfer of constitutional issues directly to the New Hampshire Supreme Court nor to appeal his convictions to the superior court. Instead, he filed with the United States District Court for the District of New Hampshire a complaint for declaratory and injunctive relief.

The position of the Appellants is that federal intervention under these circumstances is improper. In *Younger* vs. *Harris*, 401 U.S. 37 (1971), this Court reaffirmed the "longstanding public policy against federal court interference with state court proceedings" (*Ibid,* at 43), citing as a fundamental reason for this policy

> ". . . the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the

moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." (*Ibid,* at 43-44).

In *Younger* the appellee had been indicted and a district court enjoined further state prosecution, finding unconstitutional the particular state statute. This Court reversed, stating:

> "It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." (*Ibid,* at 54).

In the instant case, however, the District Court dismissed any applicability of the *Younger* doctrine of equitable restraint on the basis that the Appellees did not seek to enjoin a pending criminal prosecution. (App. 70). While it is correct that guilty verdicts had been rendered, Mr. Maynard had complied with the sentence imposed upon him in each of the three criminal cases and no appeal was pending at the time he sought federal injunctive relief, the Appellants contend that the intended effect of the *Younger* decision is negated by the District Court. "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." (*Ibid,* at 43). The effect of *Younger* was to reinforce this longstanding policy. However, the District Court's exiguous interpretation of *Younger,* concluding that application of *Younger* hinges upon the pendency of a state criminal prosecution, is not only contrary to this historical policy, but also finds no support in *Younger.* In *Younger* this Court commented: "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." (*Ibid,* at 41). See also: *Samuels* vs. *Mackell,* 401 U.S. 66, at 73-74 (1971).

In *Steffel* vs. *Thompson,* 415 U.S. 452 (1974), this Court authorized a declaratory judgment to issue by a district court

restraining the enforcement of a Georgia statute upon a finding of the statute being unconstitutional as applied. The Appellants herein distinguish *Steffel* on two bases. First, the action in *Steffel* was instituted under the Federal Declaratory Judgment Act (28 U.S.C.S. §§2201-2202), whereas the complaint of the Appellees sought declaratory and injunctive relief under 42 U.S.C. §1983. (App. 5). Moreover, the permanent injunctive relief granted by the District Court in the instant case clearly constitutes the type of federal interference which Declaratory Judgment Act was intended to avoid. (See: *Perez* vs. *Ledesma,* 401 U.S. 82, at 111-115 (1971)). Second, at the time a petition for declaratory judgment was filed in *Steffel* not only was no state criminal prosecution pending, but also none had been commenced and terminated. The petitioner in *Steffel,* therefore, in comparison with Appellee Mr. Maynard, had not had the opportunity to vindicate his constitutional rights in state judicial proceedings. This second distinction is also applicable to *Doran* vs. *Salem Inn, Inc.,* 422 U.S. 922 (1975), in which this Court permitted federal declaratory relief to be granted under 42 U.S.C. §1983 to two co-plaintiffs which "were *not* subject to state criminal prosecution *at any time* prior to the issuance of a preliminary injunction by the District Court" (*Ibid,* at 930, italics supplied), but denied the granting of similar relief to a third co-plaintiff against which state criminal proceedings had been commenced. (*Ibid,* at 929). Neither *Steffel* nor *Doran* expressly authorize federal intervention and injunctive relief in an instance in which a state defendant has been afforded the opportunity to litigate his constitutional rights. In fact, in each case, this Court reaffirmed the fundamental policy of non-intervention enunciated in *Younger.* (*Ibid,* at 45).

Appellee Mr. Maynard raised and litigated his constitutional claim before the Lebanon, New Hampshire, District Court. (Exhibit No. 3. However, see Opinion, footnote 6, App. 70, to the contrary.) In light of Mr. Maynard's election neither to request the reservation and transfer of constitutional issues nor appeal the judgments, the constitutional issue was decided. Consequently, principles of collateral estoppel and *res judicata* preclude subsequent federal intervention designed to relitigate the same issue and calculated to nullify the prior State court proceedings. *Bricker* vs.

Crane, 468 F.2d 1228, 1231 (1st Cir. 1972), *cert. denied* 410 U.S. 930 (1973); *Mastracchio* vs. *Ricci,* 498 F.2d 1257 (1st Cir. 1974), *cert. denied* 420 U.S. 909 (1975).

Under the circumstances of this case, the position of the Appellants that federal intervention is improper and unwarranted does not result in the Appellees being placed "between the Scylla of intentionally flouting state law and the Charybdis of foregoing what (they) believe(s) to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." (*Steffel, supra,* at 462). The initial and repeated acts of Appellee Mr. Maynard in obscuring the State Motto on his motor vehicle license plates constituted knowing violations of State law. (App. 17-22). By his deliberate conduct he selected the judicial forum within which to have heard his constitutional claims, foregoing the commencement of a federal action for declaratory relief and electing, instead, criminal prosecution within the State courts. Having thus elected and there being no evidence before this Court that the New Hampshire State courts are unable to protect his constitutional rights, the exhaustion of State judicial remedies becomes preferable if not mandatory. The circumstances of this case are distinguishable from *Monroe* vs. *Pape,* 365 U.S. 167 (1961), in which no state proceedings had been commenced, *McNeese* vs. *Board of Education,* 373 U.S. 668 (1963), in which the efficacy of state administrative relief was insufficient (*Ibid,* at 674), and *Zwickler* vs. *Koota,* 389 U.S. 241 (1967), in which the challenged state statute was not susceptible to narrowing state court construction. (*Ibid,* at 250). In *Ellis* vs. *Dyson,* 421 U.S. 426 (1975), the petitioners, after being convicted under a state loitering ordinance, were permitted to seek federal declaratory relief rather than seeking a trial *de novo* within the state judicial system. While this Court stated that exhaustion of state judicial remedies is unnecessary prior to an action under 42 U.S.C. §1983, this Court also expressly noted that the petitioners not only had sought and been denied at the state level a writ of prohibition against their prosecution, but also that their right of appellate review at the state level was restricted. The Appellants herein submit that circumstances such as those present in *McNeese* and *Ellis* may provide sufficient grounds for the invocation of federal intervention prior to the exhaustion of state judicial remedies. However, in the absence of any such circumstances, considerations of equity, comity and federalism mandate federal abstention until the exhaustion of state judicial remedies. This analysis is supported by *Huffman* vs. *Pursue, Ltd.,* 420 U.S. 592 (1975), in which the appellees were denied federal injunctive and declaratory relief after having been found guilty of violation of an Ohio nuisance statute and having failed to appeal that judgment within the Ohio court system. In his majority opinion, Mr. Justice Rehnquist reasoned:

> "Appellee contends that even if *Younger* is applicable to civil proceedings of this sort, it nonetheless does not govern this case because at the time the District Court acted there was no longer a 'pending state court proceeding' as that term is used in *Younger*. *Younger* and subsequent cases such as *Steffel* have used the term 'pending proceeding' to distinguish state proceedings which have already commenced from those which are merely incipient or threatened. Here, of course, the state proceeding had begun long before appellee sought intervention by the District Court. But appellee's point, we take it, is not that the state proceeding had not begun, but that it had ended by the time the District Court complaint was filed.
>
> "Appellee apparently relies on the facts that the Allen County Court of Common Pleas had already issued its judgment and permanent injunction when this action was filed, and that no appeal from that judgment has ever been taken to Ohio's appellate courts. As a matter of state procedure, the judgment presumably became final, in the sense of being nonappealable, at some point after the District Court filing, possibly prior to entry of the District Court's own judgment, but surely after the single judge stayed the state court's judgment. We need not, however, engage in such inquiry. For regardless of when the Court of Common Pleas' judgment became final, *we believe that a necessary concomitant of* Younger *is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in* Younger.
>
> "Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to

completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts. Nor, in these state-initiated nuisance proceedings, is federal intervention at the appellate stage any the less of a disruption of the State's efforts to protect interests which it deems important. Indeed, it is likely to be even more disruptive and offensive because the State has already won a *nisi prius* determination that its valid policies are being violated in a fashion which justifies judicial abatement.

"Federal post-trial intervention, in a fashion designed to annul the results of a state trial, also deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction. We think this consideration to be of some importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. Especially is this true when, as here, the constitutional issue involves a statute which is capable of judicial narrowing. *In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts. We therefore hold that* Younger *standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies.*" (Ibid, at 607-609, italics supplied).

In the instant case the District Court summarily dismissed any applicability of this Court's opinion in *Huffman,* stating: "*Huffman,* however, is readily distinguishable. *Huffman,* like *Younger,* was a case in which granting the requested injunctive relief would have interfered with the processes of the state court by nullifying prior or pending state court proceedings. Here, no such interference can result." (App.

69-70). While this conclusion is apparently premised on the narrow analysis that the Appellees are seeking only prospective relief from further prosecution, the Appellants submit that the practical effect upon the State of New Hampshire as a result of the federal judicial intervention and injunctive relief granted is identical to that which this Court found inflicted upon the State of Ohio in *Huffman,* that is, that the interference ". . . has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." (*Huffman, supra,* at 605). (See also: *Steffel, supra,* at 466). The action of the District Court effectively nullified the prior State criminal proceedings against Appellee Mr. Maynard, condoned his engaging in conduct which the criminal laws of the State of New Hampshire prohibit, and infringed upon the sovereign State derived authority of the Appellants to administer and enforce laws as substantive as those constituting the motor vehicle registration system of the State of New Hampshire. It is precisely these types of adverse effects upon the legitimate interests of the states that caused Mr. Justice Holmes in 1926 to observe that the doctrine of equitable restraint "should be very strictly observed." *Massachusetts State Grange* vs. *Benton,* 272 U.S. 525, at 529 (1926).

The New Hampshire Supreme Court in *State* vs. *Hoskin,* 112 N.H. 332 (1972), sustained convictions of obscuration of the State Motto on New Hampshire motor vehicle license plates, holding that the defendant's First Amendment right to be free from a required affirmation or belief was not infringed. While the Appellees herein contend, in comparison, that their constitutional right to symbolic speech is infringed, the *Hoskin* case was cited to Appellee Mr. Maynard during his first trial in the Lebanon, New Hampshire, District Court. (Exhibit No. 3, App. 30). Any argument by the Appellees, however, that in light of *Hoskin* an appeal would have been futile is succintly answered by the fact that the issue presented by the Appellees was not decided in *Hoskin.* In addition and

"(m)ore importantly, we are of the opinion that the considerations of comity and federalism which underlie

Younger permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious. . . . Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do." (*Huffman* vs. *Pursue, Ltd., supra,* at 611).

The District Court ruled that "Even if the doctrine of equitable restraint barred Mr. Maynard's suit . . . (his) failure to appeal his state convictions could not bar Mrs. Maynard's federal action for protection from future state criminal prosecution." (App. 70). The Appellants disagree. The parties stipulated that Mrs. Maynard is a co-owner of the two motor vehicles (App. 14) and shares her husband's religious beliefs (App. 45). And while it was further stipulated that she would have testified that she permitted to be obscured the State Motto on the license plates (App. 46), the evidence is that she was not present and took no part in the criminal activity of Mr. Maynard. (App. 39). There also is no evidence that she *knowingly* permitted the obscuration of the license plates. (N.H. RSA 262:27-c (supp), *supra*). No State criminal proceeding had been commenced against her at the time of the District Court filing. The federal action of the Appellees sought relief under 42 U.S.C. §1983 (App. 5) and, accordingly, the burden of proof in part of Appellee Mrs. Maynard was to show that the Appellants had subjected her to the deprivation of her First Amendment right to freedom of speech. The Appellants argue that this requisite burden of proof was not satisfied. Unlike the petitioners in *Steffel* vs. *Thompson, supra,* Mrs. Maynard engaged in no activities with which the Appellants interfered. Therefore, Mrs. Maynard's action fails, not as the District Court held by reason of Mr. Maynard's failure to appeal his State convictions, but due to her failure to prove a *prima facie* case under 42 U.S.C. §1983. Had Appellee Mrs. Maynard sought declaratory relief under the Federal Declaratory Judgment Act (28 U.S.C. §2201), then her threshold burden would have been to demonstrate clearly that there was a continuing "actual controversy". (*Steffel* vs. *Thompson, supra,* at 458 and *Ellis* vs. *Dyson, supra,* at 433). Since she failed to request such relief, the Appellants, subject only to the observation that there is no evidence that Mrs. Maynard *planned* to engage in

conduct for which she feared prosecution, do not address herein the issue of whether a genuine controversy exists between Mrs. Maynard and the Appellants. (See: *Younger* vs. *Harris, supra,* at 42). Finally, with respect to Appellee Mrs. Maynard, the Appellants note that she is the wife of Mr. Maynard, is co-owner of the motor vehicles, and "shares her husband's religious beliefs". (App. 45). In addition, the facts and testimony before the District Court suggest that Mrs. Maynard's religious actions and beliefs are strongly influenced by her husband. (App. 25-29, 39, 46). For these reasons, the Appellants contend that the Appellees, while being " . . . legally distinct parties (,) are so closely related that they should all be subject to the *Younger* considerations which govern any one of them. . . ." (*Doran* vs. *Salem Inn, Inc., supra,* at 928). But for the religious convictions and criminal conduct of Mr. Maynard, it is highly doubtful that Mrs. Maynard would have instituted federal litigation. There has been no infringement of her First Amendment rights.

II.

CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE STATE OF NEW HAMPSHIRE MAY PROHIBIT BY CRIMINAL SANCTION THE KNOWING OBSCURATION OF THE WORDS "LIVE FREE OR DIE" ON NEW HAMPSHIRE MOTOR VEHICLE LICENSE PLATES.

N.H. RSA 262:27-c (supp), entitled "Misuse of Plates", establishes the misdemeanor offense of knowingly obscuring or permitting to be obscured the figures or letters on any license plate attached to any motor vehicle. The source of this statute is *N.H. Laws 1905,* ch. 86, §2, which provided for the registration of all automobiles; §5, which provided that the "registered number or mark is at all times (to be) displayed . . . as to be unobstructedly visible"; and §10, which established the penalty upon conviction. In 1911, ch. 86 of the *N.H. Laws 1905* was repealed by *N.H. Laws 1911,* ch.

133, §5 of which provided that every automobile "shall have its register number displayed conspicuously thereon", that the number plates "shall be kept clean", and that in the event a number plate became mutilated or illegible a mandatory obligation arose to acquire a replacement; and §18 of which set forth the offense and penalty against any person "who obscures or permits to be obscured the figures on any number plate attached to any motor vehicle." In 1971, ch. 133 of the *N.H. Laws 1911* was repealed by *N.H. Laws 1921*, ch. 119, §§3(a), 5 and 17 of which, however, carried forth the 1911 provisions cited above. In 1957, N.H. RSA 262:27 was amended to include the element of knowledge in the crime of obscuring or permitting to be obscured the figures on any number plate. In 1967, the statute was amended to include "figures *or letters*."

With regard to the particular letters and figures appearing on number plates, the original 1905 New Hampshire legislation required the New Hampshire Secretary of State to issue license plates "bearing the distinguishing number or mark of his vehicle, followed by the letters N.H." *N.H. Laws 1905*, ch. 86, §2. Subsequently, the Secretary of State was instructed to include "figures showing the year of issue." *N.H. Laws 1911*, ch. 133, §2. In 1943, the issuance of license plates having been transferred to the New Hampshire Commissioner of Motor Vehicles, the Commissioner was authorized to "make special regulations relative to the number of plates, material and design thereof." *N.H. Laws 1943*, ch. 3, §2. N.H. RSA 260:9 (supp) also provides for the issuance of license plates "of suitable design."

Prior to 1957 license plates each year included, in addition to the numbers and letters, the abbreviation "N.H." or the words "New Hampshire." Between the years 1957 and 1970, all license plates included, in addition to the words "New Hampshire", the word "Scenic", with the exception, however, of 1963, in which year the word "Photoscenic" was substituted for the word "Scenic." These variations were initiated pursuant to the authority granted by N.H. RSA 263:1 (supp) to the Commissioner or Director of Motor Vehicles. In 1945, the New Hampshire General Court adopted the words "Live Free or Die" as the official New Hampshire State Motto (N.H. RSA 3:8) and in 1969 directed that the State Motto appear on all license plates for non-commercial motor vehicles. (N.H. RSA 263:1 (supp)). Accordingly, beginning in 1971 all non-commercial vehicles have been issued license plates having, in addition to the particular letters and numbers for the vehicle, the words "New Hampshire" and the words "Live Free or Die." The full text of N.H. RSA 263:1 (supp) is as follows:

> "Number Plates. Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto 'live free or die' written thereon. The plates shall be kept clean."

For the calendar year 1974, the State of New Hampshire issued approximately 526,000 license plates. (App. 49). Of these, approximately 325,000 were issued for non-commercial vehicles and contained the State Motto. (App. 50). The balance—those not containing the State Motto, were issued either for special categories of commercial vehicles—general commercial (55,000), tractor (15,000), trailer (60,000), agricultural (5,500), farm (3,250), antique (800), ambulance (+) (300), transportation (300), repair (625) and diesel (6,000), or, by legislative direction, for special individuals or State or local government departments, for example, governor, governor's council, president of the senate, members of the senate, speaker of the house of representatives, members of the house of representatives, the attorney general and his deputy, county sheriffs, deputy sheriffs, and vehicles of State police and State motor vehicle departments (N.H. RSA 260:10 (supp)). (See also: N.H. RSA 260:11-b, 17 and 18 (supp)). (App. 66, Exhibit No. 8).

The Appellees were issued license plates of the standard design bearing the year of issue and the State Motto at the top, identifying letters and numbers in the middle and the words "New Hampshire" at the bottom. Upon the payment of a five dollar fee, the Appellees could have obtained "vanity plates", so-called, these license plates being similar to the standard license plates with the exception that up to five letters of the applicant's choice are substituted for the iden-

tifying letters and numbers in the middle. N.H. RSA 260:10-a (supp). (App. 50). As the motor vehicles of the Appellees are non-commercial and as the Appellees are not entitled to any of the foregoing described specially-issued license plates, the Appellees have no alternative, under New Hampshire's statutory system of motor vehicle registration, but to have license plates bearing the State Motto. (App. 23, Exhibit No. 8).

The First Amendment contentions of the Appellees are, first, that the State Motto on their license plates constitutes a required affirmation or belief and, second, that their acts of obscuring the State Motto constitute protected symbolic speech. In *State* vs. *Hoskin, supra,* the New Hampshire Supreme Court dismissed the first argument, saying:

> "The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they endorse that motto or profess to adopt it as matter of belief. . . . [we] think that viewers do not regard the uniform words or devices upon registration plates as the craftsmanship of the registrants. They are known to be officially designed and required by the State of origin. The hard fact that a registrant must display the plates which the State furnished to him if he would operate his motor vehicle is common knowledge." (*Ibid,* at 336-337).

In the instant case, while one judge would have found N.H. RSA 262:27-c (supp) violative of Appellees' right to be free from a compelled affirmation or belief (App. 71, footnote No. 9), the District Court did not consider this argument. (App. 71). The Appellants rely upon the decision of the New Hampshire Supreme Court in *Hoskin, supra.*

The basis of the District Court's injunctive relief is its conclusion that the conduct of the Appellees constituted constitutionally protected symbolic speech. The Appellants believe this conclusion is incorrect. While certain limited types of conduct have been characterized by the courts as "symbolic speech", this "conduct" exception to the traditional view of speech as the written and spoken word is of exceedingly narrow compass and should not be extended to the facts of the instant case. Endeavors to delineate "the

nebulous realm of symbolic speech" (*Goguen* vs. *Smith,* 471 F.2d 88, at 104 (1st Cir. 1972)) have been undertaken by this Court in several recent significant cases. *United States* vs. *O'Brien,* 391 U.S. 367 (1968), presented the issue of whether the burning of a Selective Service registration certificate may be symbolic speech. While refraining from deciding whether such conduct triggers First Amendment protection, this Court sustained the defendant's conviction, holding that

> ". . . a government regulation is sufficiently justified if it (1) is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (*Ibid,* at 377, numbers supplied).

The facts of the instant case satisfy this four-prong test. First, since N.H. RSA 262:27-c (supp) embraces regulations designed to promote the general welfare, public convenience and public safety, it clearly is within the constitutional or "police power" of the State. (See, e.g., *Nashville, C. & St. L. Ry.* vs. *Walters,* 294 U.S. 405 (1935); *Nebbia* vs. *New York,* 291 U.S. 502 (1934); *Schmidinger* vs. *Chicago,* 226 U.S. 578 (1913); and *California Reduction Co.* vs. *Sanitary Works,* 199 U.S. 306, at 318 (1905); Note, *Of Shadows and Substance: Freedom of Speech, Expression, and Action,* 1971 Wisc. L. Rev. 1208 (1971)). The *New Hampshire Constitution,* Part II, Article 5, provides in part:

> ". . . full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state. . . ."

Second, the requirement that the State Motto appear on non-commercial motor vehicles (N.H. RSA 263:1 (supp) and

N.H. RSA 262:27-c (supp)) furthers important and substantial State governmental interests — the facilitating of motor vehicle identification and law enforcement, the fostering of appreciation of State history and tradition, the creating of State pride, identity and individualism, and the promoting of tourism. The overall design, material and color of a license plate, authorized by statute and duly issued by the Appellant Commissioner of the Department of Motor Vehicles, serves the purpose of vehicle identification and that purpose is defeated by the indiscriminate obscuration of all or any portion of any such license plate. Appellant Wooley, Chief of Police of Lebanon, New Hampshire, testified that enforcement of the motor vehicle laws is facilitated by the State Motto appearing on non-commercial license plates, the benefits being the ease of distinguishing New Hampshire license plates from those of similar colors of other states and the ease of discovering misuse of license plates, for instance, the use of a "trailer" license plate on a non-commercial vehicle. (App. 56-57). In *State* vs. *Hoskin, supra,* the New Hampshire Supreme Court concluded:

> "But regardless of its historical significance, the official State motto became a part of 'letters' appearing on New Hampshire registration plates, and as such served with other letters and figures *as a means of identification of the vehicles upon which it appeared. Similarly the slogans and mottoes which appear upon plates issued by other states, serve to aid in identification of vehicles registered there.*" (*Ibid,* at 334, italics supplied).

The State Motto on license plates also fosters appreciation of New Hampshire's history, tradition, pride, identity and individualism—values common to each of the fifty states of the Union. In the year 1785, the independence of the colonies having been established, the New Hampshire General Court devoted itself to framing laws designed to promote the general welfare of the State. In that year, an act was passed to establish a State Seal. 5 *Laws of New Hampshire,* First Constitutional Period 1784-1792, ch. 2, p. 40. There subsequently were established a State Flag, State Flower, State Motto, State Emblem, State Tree and State Songs. N.H. RSA 3. That such legislation legitimately furthers important or substantial governmental interests was affirmed in *Halter* vs. *Nebraska,* 205 U.S. 34 (1907):

> "As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected." (*Ibid,* at 43).
>
> "It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that and, in addition, adjudge that it violates rights secured by the Constitution of the United States." (*Ibid,* at 45).

Lastly, as tourism is a primary source of income to the State of New Hampshire, the promotion of tourism by utilization of the State Motto on non-commercial motor vehicles registered in New Hampshire is also distinctly designed to further an important and substantial government interest. In *Froslid* vs. *Hults,* 248 N.Y.S.2d 676, 20 A.D.2d 498, *appeal dismissed* 199 N.E.2d 166, 14 N.Y.2d 722, 250 N.Y.S.2d 68 (1964), the New York State Commissioner of Motor Vehicles, under statutory authority, prescribed that the words "Worlds' Fair" be placed on license plates issued in 1964 and 1965. In upholding the constitutionality of this regulation, the Court concluded that license plates may serve public purposes other than the raising of revenue and vehicle identification. They also may serve the purpose of promoting tourism.

The third prong of the *O'Brien* analysis is that N.H. RSA 262:27-c (supp) must further a governmental interest which is unrelated to the suppression of free expression. The holding of the District Court, below, that since the statute ensures the widest possible dissemination of "the message" contained in the State Motto the statute "is directly related to the suppression of free expression" (App. 75), transgresses the scope of *O'Brien.* In *O'Brien,* this Court observed: "A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax

law prohibiting the destruction of books and records." (*Ibid*, at 375). While the defendant in *O'Brien* was obliged to keep his Selective Service certificate in his personal possession at all times, the Appellees herein are obliged only to operate their motor vehicles with duly issued State license plates. And in the factual situation of *O'Brien*, "the message" of the defendant's Selective Service certificate was much more particularized than "the message" of the State Motto on a New Hampshire motor vehicle license plate. The District Court's holding is also assailable by analogy to the legal requirement (31 U.S.C. §324-a) that our National Motto, "In God We Trust", appear on all our coins and currency. This requirement ensures even greater dissemination of "the message" since currency is personally passed by hand. Nevertheless, it is a federal felony to alter, deface, mutilate, or impair any coins or any evidence of national bank obligations. 18 U.S.C. §§331 and 333.[1] To deface a coin or federal bank note by obscuring the National Motto clearly tends to defeat the establishment of a uniform national monetary system — a governmental interest which is unrelated to the suppression of free expression. Likewise, to deface a license plate by obscuring the State Motto clearly tends to defeat the establishment of a duly authorized uniform State motor vehicle registration system. For this reason, the second significant case of symbolic speech decided by this Court, *Spence* vs. *Washington*, 418 U.S. 405 (1974), is inapposite for while the defacement of a flag was found not to impair significantly any interest of the State of Washington in preserving the integrity of a privately-owned flag, in the instant case the significant interest of the State of New Hampshire in a uniform system of motor vehicle identification was directly impaired by the acts of the Appellees in defacing State-issued license plates.

For the State of New Hampshire to require that no portion of the letters or numbers on license plates be obscured has no relationship to the freedom of expression of the Appellees. With absolutely no fear of prosecution, the Appellees are at liberty to criticize or denounce the State Motto of New Hampshire, selecting their own preferred and practically

[1] See App. 41.

unlimited modes of verbal or written expression. That Appellee Mr. Maynard, a printer by trade, is cognizant of these opportunities is evidenced by his testimony:

"XQ. But you could print a bumper sticker relative to your disagreement with the slogan "Live Free or Die," could you not?

A. Yes, but the State would object to it.

XQ. What makes you say that?

A. Well, if I had a bumper sticker to show any objection to the "Live Free or Die," I would have an illustration of a dog raising his leg on the State Motto.

. . .

XQ. So there would be no law that you would be breaking if you were to make such a bumper sticker and adhere it to your car, would there, to your knowledge?

A. That's right. I wouldn't be breaking a law, that's correct." (App. 39).

Whatever their attitudes and eccentricities may be (App. 37-38, 40-41), the Appellees may express them free of censor and in accordance with the rationale behind the First Amendment — the free trade in ideas.

The fourth prong of the *O'Brien* analysis is that the incidental restriction on the Appellees' First Amendment freedoms occasioned by N.H. RSA 262:27-c (supp) must be no greater than is essential to the furtherance of the State's interests. The Appellants submit that this particular analysis does not require them to prove that there is "no less restrictive alternative capable of serving the state's interest as efficiently as it is served by the regulation under attack." Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, at 1484-1485 (1975). To impose such a burden would serve to justify a finding of unconstitutional-

ity of any regulation resulting in incidental restrictions on First Amendment freedoms. In the instant case, for instance, it is possible for the State of New Hampshire to establish a workable motor vehicle registration system without utilizing the State Motto on license plates, to foster appreciation of State history and tradition by massive educational efforts, to create State pride, identity and individualism by holding patriotic oriented events, and to promote State tourism by the expenditure of additional monies for customary promotional advertising.[2] The futility of this "less restrictive alternative" approach to the fourth prong of the *O'Brien* test suggests that

> "The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever." (88 Harv. L. Rev., *supra,* at 1497).

Applying this analysis to N.H. RSA 262:27-c (supp), the conclusion must be that the foregoing enunciated purposes of the statute have no relationship whatsoever with communication on the part of the Appellees. In other words, the obscuration by the Appellees of the State Motto on their license plates would defeat the purposes of its presence regardless of the communicative significance of the conduct and even if the conduct had no communicative significance whatsoever.

Application of the *O'Brien* analysis presupposes, however, that the conduct of the Appellees constituted symbolic

[2] See, however, *O'Brien, supra,* at 381: "We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction." This observation equally could be applied to motor vehicle license plates. Yet, as the Appellants herein acknowledge possible alternative, but less desirable, means to further the same State interests, so are there possible alternative means to assure the availability of Selective Service certificates. See 88 Harv. L. Rev., *supra,* at 1487.

speech. The District Court so found. The Appellants conclude otherwise. The acts of Appellee Mr. Maynard in physically cutting out a portion of and placing non-transparent tape over the remaining portion of the State Motto on his license plates (App. 17-22) were undertaken by him in the privacy of the driveway of his residence, in the probable absence of any other persons, and in connection with which he made no written statement and either made no verbal statement or, if he did, he "can't recall." (App. 39-40). (See, *Street* vs. *New York,* 394 U.S. 576, at 585 (1969)). In light of these circumstances, any communicative characteristic of his conduct necessarily would have had to have arisen subsequently when the Appellees' motor vehicles were exposed to the public. (See *Spence, supra,* at 409). So the crucial question is whether, upon another person's observing non-transparent tape over the State Motto, "(a)n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." (*Spence, supra,* at 410-411).

The source of New Hampshire's State Motto derives from General John Stark who in 1809 wrote a letter to his old Vermont comrades declining for reasons of health to attend the 32nd reunion of the 1777 battle of Bennington in which he had commanded the Continental troops in a decisive battle defeating the British and German.[3] At the conclusion of his letter in 1809, General Stark proposed a toast for the reunion: "Live free or die; Death is not the worst of evils." Moore, Howard P., *A Life of General John Stark of New Hampshire,* p. 500 (1949); Pillsbury, Hobart, *New Hampshire–A History,* Vol. II, p. 385 (1927). Appellee Mr. Maynard's testimony concerning his disagreement with his understanding of the words "Live Free or Die" (App. 25-28, 36-37, 41-42) was summarized by the District Court as ". . . deeply held, fundamentally religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if

[3] The United States flag had been adopted by Congress on June 14, 1777, and General Stark's army at the battle of Bennington carried the stars and stripes for the first time on any battlefield.

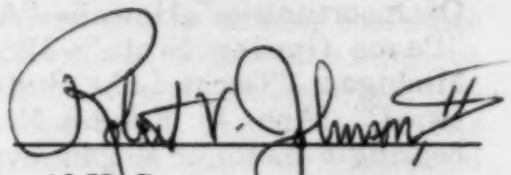
the alternative is living in bondage." (App. 71). For some persons, the words "Live Free or Die" may have political or philosophical significance; however, the phrase is not conducive to a general universal interpretation. Therefore, the observation by another person that the State Motto on Appellees' motor vehicles had been covered over with tape cannot be said to convey any message other than that the Appellees were violating the law (App. 29) or that for some unknown reason they preferred not to exhibit the State Motto. The message conveyed certainly was not the religious or philosophical concepts of Mr. Maynard, either as testified to by him or summarized, above, by the District Court. The only message which the District Court found communicated was the Appellees' "strong disagreement with implications of the message (State Motto)." (App. 71). This falls far short of meeting the "particularized message" standard of *Spence*. Furthermore, in *Spence* the surrounding circumstances — the special nature of flags, the peace symbol and current (1970) "issues of great public moment . . . the Cambodian incursion and the Kent State tragedy" (*Spence, supra,* at 410), acted not only to particularize the actor's message, but also to establish the requisite great likelihood that the message would be understood by those who viewed it. (See also, *Tinker* vs. *Des Moines Independent School District,* 393 U.S. 503 (1969)). In comparison, the instant case is devoid of any relevantly meaningful surrounding circumstances which conceivably could have rendered the "message" likely to be understood. The District Court acknowledged that ". . . the act of covering the motto on a license plate may, in some cases, be an act of pure whimsy." (App. 71). The Appellants submit that but for the *post facto* courtroom explanation by Mr. Maynard of his conduct, his conduct in fact would be pure whimsy. This crucial distinction between conduct which, by its intrinsic nature and by surrounding circumstances conveys without further explanation a particularized message likely to be understood, and, on the other hand, conduct which, due to its ambiguous nature and by the absence of relevant surrounding circumstances conveys no particularized message likely to be understood without further explanation, was recognized by this Court in *Spence*: "A flag bearing a peace symbol and displayed upside down by a student today (June, 1974) might be interpreted

as nothing more than bizarre behavior. . . ."(*Spence, supra,* at 410). (Date supplied). It is prevalent among all the fifty states that mottoes or slogans appear on license plates: for example, Oklahoma—"Oklahoma Is OK"; Nebraska—"Cornhusker State"; Idaho—"Famous Potatoes"; Florida—"Sunshine State"; North Carolina—"First In Freedom"; Connecticut—"Constitution State"; Albama—"Heart of Dixie"; Louisiana—"Sportman's Paradise"; Arkansas—"Land Of Opportunities"; Hawaii—"Aloha State"; North Dakota—"Peace Garden State"; Illinois—"Land of Lincoln"; Michigan—"Great Lake State"; Ohio—"Seat Belts Fastened?", (App. 48; Exhibit No. 7). Any such license plate bearing a motto or slogan, even one which may be interpreted to have political or philosophical overtones such as "Live Free or Die", "Land of Lincoln", "First In Freedom", or "Peace Garden State", does not constitute an emotionally charged symbol such as a flag or a draft card and, therefore, does not reach the unique communicative connotations inherent in these objects. (See: *Board of Education* vs. *Barnette,* 319 U.S. 624, at 632 (1943); *Stromberg* vs. *California,* 283 U.S. 359, at 369 (1931); Note, *Symbolic Expression: Flag Desecration–Attitudes and the Law,* V Suffolk Uni. L. Rev. 442, at 466 (1971)). Consequently, if the act of placing tape over such a motto or slogan on a license plate is to rise to the level of symbolic speech, then the speech element of the act must of necessity be more communicative than the nonspeech element of the act. (*Crosson* vs. *Silver,* 319 F. Supp. 1084, at 1087 (D.C., Dist. of Ariz., 1970)). Since this case does not present such a situation, the conduct of the Appellees fails to warrant First Amendment protection.

CONCLUSION

For the reasons stated, the Appellants respectfully submit that the judgment of the Court below should be reversed.

Respectfully submitted,



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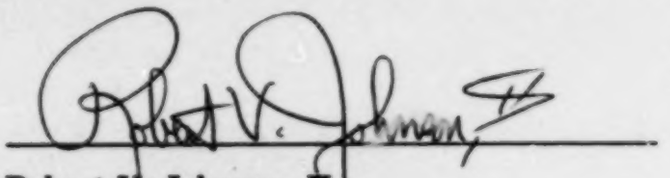
CERTIFICATE OF SERVICE

I, Robert V. Johnson, II, Assistant Attorney General, State of New Hampshire, one of counsel for Appellants, hereby certify that the foregoing Brief For Appellants was served on the Appellees by depositing three copies each of same in the United States Mail, first class postage prepaid, this second day of August, 1976, addressed to counsel for Appellees, R. David DePuy, Esquire, and Jack B. Middleton, Esquire, 40 Stark Street, Manchester, New Hampshire 03105, and Richard S. Kohn, Esquire, Suite 526, 733 15th Street, N.W., Washington, D.C. 20005.



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